

Augustin Raj a/l Augustin v Selva Kumar a/l Parmal

HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NO
MT4-24-189 OF 2009
AZIMAH OMAR J
4 APRIL 2017

Civil Procedure — Contempt of court — Committal proceeding — Plaintiff obtained court's order for defendant to produce final audited account — Defendant failed to produce final audited account — Plaintiff obtained leave for committal proceeding — Whether plaintiff failed to comply with O 52 r 4(3) of the Rules of Court 2012 — Whether management account produced by defendant complied with court's order — Rules of Court 2012 O 52 rr 3 & 4

The plaintiff and the defendant were partners in a firm known as Sinar Cahaya Automobile Repair & Service ('Sinar Cahaya'). Disputes arose between the parties in relation to the management of Sinar Cahaya which led to the filling of encl 1 by the plaintiff. In the said encl 1, the plaintiff, inter alia, applied for the defendant to produce an account of all Sinar Cahaya's debts, liabilities, payments, receivables, payments, dealings and transactions of monies, transactions from June 2005 up to 31 August 2008. The court allowed encl 1 and in the amended order, there was a penal endorsement to facilitate the commencement of committal proceedings against the defendant. The defendant failed to prepare the final audited account and consequently, the plaintiff initiated contempt proceedings against the defendant. The plaintiff had obtained leave pursuant to O 52 r 3(2) of the Rules of Court 2012 ('the ROC'). Upon being granted leave, the plaintiff filed notice of application for an order of committal against the defendant ('encl X') pursuant to O 52 r 4(1) of the ROC. In opposing encl X, the defendant submitted that there was a failure on the plaintiff's part to comply with O 52 r 4(3) of the ROC namely; to personally serve the defendant the notice of application to apply for an order of committal, accompanied by a copy of the statement and affidavit in support of the application for leave under r 3 and the order granting such leave. The defendant further submitted that the terms of the said order allegedly did not state or mention that the account to produce by the defendant must be a final audited account. And thus, the defendant alleged that the plaintiff could not contend that the said management account did not comply with the said order just because it was not an audited account.

Held, allowing application for order of committal against the defendant and sentencing defendant to three months' imprisonment:

- A (1) When the defendant had only raised the issue of non-service of the cause paper at the eleventh hour and had all along proceeded to defend himself by producing the unaudited management account and filing affidavits, the defendant had not been prejudiced at all of the non-service and there was no injustice caused to the defendant. In this instance, the cause papers were duly served on the defendant upon request by the defendant's solicitor, therefore, the plaintiff had fulfilled the requirement of O 52 r 3(2) of the ROC. Be that as it may, O 52 r 4(4) of the ROC gives the court the discretion to dispense with the service of the notice if it thinks just to do so and the court under O 1A and O 2 r 2 of the ROC has discretion to rectify and cure the non-compliance (see paras 22–23).
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- D (2) In the present case, even though the said order did not specifically mention the words 'audited account', from the beginning since the order was granted, it was within the parties' mutual understanding that the defendant had taken upon himself to furnish the plaintiff with an audited account and that the audited account was to be prepared by a firm of auditors and not by the defendant himself. In fact, the defendant's solicitors had specifically informed the plaintiff's solicitors that the defendant would engaged the accounting firm of Shaistri & Co to undertake the task of preparing the audited accounts. Thus, the defendant obviously knew what was required of him when the court ordered him to furnish the accounts as stipulated in the original order. Therefore, the defendant could not now rely on mere semantics by justifying that a 'management accounts' fulfilled the requirement of audited accounts (see paras 50–52).
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[Bahasa Malaysia summary]

- G Plaintiff dan defendan adalah rakan kongsi di dalam firma yang dikenali sebagai Sinar Cahaya Automobile Repair & Service ('Sinar Cahaya'). Pertikaian berbangkit di antara pihak-pihak berkaitan kepada pengurusan Sinar Cahaya yang membawa kepada pemfailan lampiran 1 oleh plaintiff. Di dalam lampiran 1 tersebut, plaintiff, antara lain, memohon untuk defendan mengemukakan akaun kesemua hutang, liabiliti, bayaran, belum terima, bayaran, pengurusan dan transaksi wang Sinar Cahaya, transaksi-transaksi dari Jun 2005 sehingga 31 Ogos 2008. Mahkamah membenarkan lampiran 1 dan di dalam perintah yang dipinda, terdapat pengendorsan penal untuk memudahkan permulaan prosiding komital terhadap defendan. Defendan gagal untuk menyediakan akaun akhir yang telah diaudit dan akibatnya, plaintiff memulakan prosiding penghinaan terhadap defendan. Plaintiff telah memperoleh izin berikutan A 52 k 3(2) Kaedah-Kaedah Mahkamah 2012 ('KKM'). Setelah diberi izin, plaintiff memfailkan notis permohonan untuk perintah komital terhadap defendan ('lampiran X') berikutan A 52 k 4(1) KKM. Dalam menentang lampiran X, defendan berhujah bahawa terdapat kegagalan oleh pihak plaintiff untuk mematuhi A 52 k 4(3) KKM iaitu; untuk
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secara peribadi menyerahkan kepada defendan notis permohonan untuk memohon bagi perintah komital, berserta salinan pernyataan dan affidavit sokongan terhadap permohonan untuk izin di bawah k 3 dan perintah yang memberikan izin sedemikian. Defendan selanjutnya berhujah bahawa terma-terma perintah tersebut didakwa tidak menyatakan atau menyebut bahawa akaun yang dikehendaki dikemukakan oleh defendan mestilah akaun akhir yang telah diauditkan. Dan oleh itu, defendan mendakwa bahawa plaintif tidak boleh berhujah bahawa akaun pengurusan tersebut tidak mematuhi perintah tersebut hanya kerana ia bukan akaun yang telah diauditkan.

Diputuskan, membenarkan permohonan bagi perintah komital terhadap defendan dan menjatuhkan hukuman penjara tiga bulan terhadap defendan:

- (1) Apabila defendan hanya membangkitkan isu ketidakserahan kertas kausa pada saat-saat terakhir dan sememangnya telah meneruskan untuk membela dirinya dengan mengemukakan akaun pengurusan yang tidak diaudit dan memfailkan affidavit-afidavit, defendan langsung tidak diprejudiskan akibat ketidakserahan dan tidak terdapat ketidakadilan disebabkan kepada defendan. Dalam kes ini, kertas-kertas kausa telah diserahkan ke atas defendan dengan wajar atas permintaan peguam defendan, oleh itu, plaintif telah memenuhi kehendak A 52 k 3(2) KKM. Walau bagaimanapun, A 52 k 4(4) KKM memberikan mahkamah budi bicara untuk diketepikan dengan penyerahan notis jika ia fikirkan hanya untuk berbuat sedemikian dan mahkamah di bawah A 1A dan A 2 k 2 KKM mempunyai budi bicara untuk membetulkan dan meremedikan ketidakpatuhan tersebut (lihat perenggan 22–23).
- (2) Dalam kes ini, walaupun perintah tersebut tidak secara spesifik menyebut perkataan-perkataan ‘audited account’, daripada mula semenjak perintah diberikan, ia adalah dalam pemahaman bersama pihak-pihak bahawa defendan telah dengan sendirinya mengemukakan akaun yang telah diauditkan kepada plaintif dan akaun yang telah diauditkan tersebut perlu disediakan oleh firma juruaudit dan bukan oleh defendan sendiri. Sebenarnya, peguam defendan telah secara spesifik memberitahu peguam plaintif bahawa defendan akan mendapatkan khidmat firma perakaunan Shaistri & Co untuk menjalankan tugas menyediakan akaun yang diaudit tersebut. Oleh itu, defendan secara jelas tahu apa yang dikehendaki daripadanya apabila mahkamah memerintahkannya untuk mengemukakan akaun-akaun tersebut seperti yang dinyatakan di dalam perintah asal. Oleh itu, sekarang ini defendan tidak dapat bergantung ke atas semantik semata-mata dengan menjustifikasikan bahawa ‘management accounts’ memenuhi kehendak akaun yang telah diauditkan (lihat perenggan 50–52).]

A Notes

For cases on committal proceedings, see 2(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2482–2524.

Cases referred to

- B** *B (JA) (An Infant), Re* [1965] Ch 1112, Ch D (refd)
Folin & Brothers Sdn Bhd (in liquidation) v Wong Boon Sun & Ors and another appeal [2009] 5 MLJ 362, CA (refd)
Messrs Hisham, Sobri & Kadir v Kedah Utara Development Sdn Bhd & Anor [1988] 2 MLJ 239 (refd)
- C** *Syarikat M Mohamed v Mahindapal Singh & Ors* [1991] 2 MLJ 112, HC (refd)
Tan Sri Dato' (Dr) Rozali Ismail & Ors v Lim Pang Cheong @ George Lim & Ors [2012] 3 MLJ 458, FC (refd)

D Legislation referred to

Rules of Court 2012 O 1A, O 2 r 2, O 52 rr 3, 3(2), 4(1), 4(3), 4(4)

K Puspalingam (Puspalingam, Kasmani & Partners) for the plaintiff.
Stanislaus Cross (Cross & Assoc) for the defendant.

E **Azimah Omar J:**

INTRODUCTION

- F** [1] Enclosure X is the plaintiff's application for an order of committal pursuant to O 52 r 4(1) of the Rules of Court 2012 ('the ROC 2012') to be made against the defendant.
- G** [2] The plaintiff has been granted leave to commence contempt proceedings against the defendant (alleged contemnor) by the High Court pursuant to O 52 r 4(1) of the ROC 2012 on 29 March 2016.

BACKGROUND FACTS

- H** [3] The background facts which had led to the filing of encl X by the plaintiff are as follows:
- (a) both the plaintiff (Augustin Raj a/l Augustin) and the defendant (Selva Kumar a/l Parmal) are individuals. The plaintiff and defendant were
- I** partners in a partnership firm known as Sinar Cahaya Automobile Repair & Service ('Sinar Cahaya');

- (b) disputes arose between the plaintiff and the defendant with regard to the management of Sinar Cahaya and those disputes has led to the plaintiff filing encl 1 (Originating Summons) in 2009 seeking, inter alia, for the following orders:
- (i) *satu perintah bahawa seorang wakil yang dicadangkan oleh plaintiff dilantik untuk menerima kesemua hutang yang belum dibayar kepada perkongsian oleh penghutang-penghutang dan lain-lain harta, aset-aset dan lain-lain harta ataupun efek-efek yang dimiliki oleh perkongsian dan untuk tujuan itu kesemua arahan teratur boleh diberi oleh mahkamah yang mulia ini dari masa ke semasa;*
- (ii) *mengemukakan satu akaun hutang-hutang dan liabiliti-liabiliti sehingga 31 Mei 2008 kepada plaintiff dalam masa tujuh hari dari tarikh perintah diberi;*
- (iii) *mengemukakan satu akaun kesemua penerimaan dan pembayaran, kesemua urusniaga dan transaksi defendan berkenaan dengan perkongsian ini setakat 31 Mei 2008 kepada plaintiff dalam masa tujuh hari dari tarikh perintah diberi; dan*
- (iv) *menjelaskan kepada plaintiff tentang segala apa yang berlaku terhadap hartanah dan aset-aset perkongsian ini semenjak 31 Mei 2008;*
- (c) the plaintiff's encl 1 was allowed by Zaleha Yusoff J (as she then was) on 10 January 2011;
- (d) upon receiving the sealed copy of the order dated 10 January 2011, the plaintiff had then served the sealed order on the defendant's present solicitors on 13 May 2011.
- (e) after the sealed order was served on the defendant's solicitors, there were a series of correspondences between the solicitors;
- (f) the last letter the plaintiff's solicitor received from the defendant's solicitors was a letter dated 27 April 2012 ('said letter') wherein in the said letter the defendant's solicitor gave an undertaking to forward the 'duly audited final accounts' to the plaintiff's solicitors. This letter was received by the plaintiff's solicitor on 2 May 2012. In para 2 of the said letter, the defendant's solicitor stated this:
- We write to confirm that upon checking with our client, we have been informed that the Accountants are finalizing the accounts for submission to us. We are also not able to ascertain the reasons for the delay. We shall endeavor to forward a copy of the 'duly audited Final Accounts' to you as soon as we obtain the same from our client.
- (g) however, after the said letter, there was no further correspondence from the defendant's solicitor or the defendant himself despite the fact that the

- A** plaintiff's solicitor had sent to the defendant's solicitor not less than four reminders. The last reminder was dated 14 October 2014;
- (h) since there was no response from the defendant's solicitors, the plaintiff then filed an application to amend the order dated 10 January 2011 to include a penal endorsement to facilitate the commencement of committal proceedings against the defendant;
- B**
- (i) the plaintiff's application to amend the 10 January 2011's order was allowed on 14 October 2014. Thereafter, the amended order dated 18 September 2014 was served on the defendant's solicitors;
- C**
- (j) by the plaintiff's solicitor letter dated 2 March 2015 sent to the defendant's solicitors, the defendant's solicitors were asked on the progress of the finalisation of the audited partnership accounts;
- (k) there was still no response from the defendant's solicitors pertaining to final audited account to be prepared by the defendant as directed by the order;
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- (l) on the premise that the defendant had committed an act of contempt for failing to comply with the said order, the plaintiff had initiated a contempt proceeding against the defendant;
- E**
- (m) the plaintiff had obtained leave pursuant to O 52 r 3(2) of the ROC 2012. The leave to commence committal proceeding against the defendant was granted by Akhtar Tahir J on 29 March 2016; and
- F**
- (n) Upon being granted leave, the plaintiff filed his notice of application for an order of committal against the defendant (encl X) on 8 April 2016 pursuant to O 52 r 4(1) of the ROC 2012.

THE DEFENDANT'S ATTITUDE AND BEHAVIOUR

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- [4] In the present application, this court would not being doing justice if the defendant's cavalier attitude and lackadaisical behavior on this matter is ignored by this court.
- H**
- [5] Enclosure X was fixed for hearing of the committal proceedings for the first time before this court on 16 August 2016. The defendant was present personally without any counsel representing him. On the hearing day, the counsel for the plaintiff's had informed this court that the defendant had not submitted his duly audited final accounts as being directed by the said order.
- I**
- However, the defendant had requested from this court two months' time to settle the account issues. The court had acceded to the defendant's request and had adjourned the hearing of encl X to 17 October 2016.

[6] When the encl X is called for hearing on 17 October 2016, again the

defendant requested for further adjournment on the ground that he could not finalise the partnership's account. This court had adjourned the hearing of to 17 November 2016.

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[7] Enclosure X was called for hearing on 17 November 2016 and this time around, the defendant's former counsel Encik Stanislaus had appeared in court representing the defendant. Encik Stanislaus had told this court that the management accounts is ready but the defendant requested time to file an affidavit to enclose the management accounts.

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[8] This court had again adjourned the hearing of encl X to 6 December 2016.

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[9] However, encl X could not proceed for hearing on 6 December 2016 as the defendant has yet to file his affidavit enclosing the management accounts.

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[10] This court then directed the defendant's solicitors to serve on the plaintiff's solicitors the full set of management accounts. This court also gave directions for the plaintiff to file his affidavit in reply on or by 22 December 2016 and further fixed the matter for hearing of encl X on 5 January 2017.

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[11] However, the plaintiff's affidavit in reply was only served on the defendant's solicitors on 29 December 2016. The defendant's counsel who was on Christmas leave only managed to file and serve the defendant's affidavit in reply on the plaintiff's solicitors on 4 January 2017.

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[12] On 5 January 2017, the counsel for the plaintiff had informed this court that the accountant appointed by the plaintiff would need more time to vet the management accounts. He also requested that all supporting documents to be forwarded to the plaintiff's solicitors to enable the appointed accountant to prepare his/her report and that they would require about a month to do so.

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[13] Enclosure X was finally heard on 28 February 2017. Both parties had filed their written submissions.

H

[14] At the outset, vide a letter dated 9 March 2017 to the plaintiff's solicitor, the defendant's counsel, Encik Stanislaus had raised a procedural objection against the plaintiff's notice of application for a committal order dated 8 April 2016. It was contended that there was a failure on the plaintiff's part to comply O 52 r 4(3) of the ROC 2012 namely; to personally serve the defendant the notice of application to apply for an order of committal, accompanied by a copy of the statement and affidavit in support of the

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A application for leave under r 3 and the order granting such leave.

[15] The defendant had contended that what was served to him were only the 'Notis Permohonan' dated 8 April 2016 and a copy of the 'Afidavit Sokongan' affirmed by the plaintiff which exhibited the order for leave dated 29 March 2016. A copy of the statement and affidavit in support of the application for leave was not served to him.

[16] It was submitted by the counsel for the defendant that the O 52 r 4(3) is a mandatory provision and therefore it must be strictly complied with by the plaintiff. The plaintiff's failure to comply the provision is fatal. On the purported non-compliance, the defendant has urged this court to dismiss the plaintiff's application.

D [17] In support of his contention, the counsel for the defendant relied on the following cases:

(a) *Syarikat M Mohamed v Mahindapal Singh & Ors* [1991] 2 MLJ 112;

E (b) *Tan Sri Dato' (Dr) Rozali Ismail & Ors v Lim Pang Cheong @ George Lim & Ors* [2012] 3 MLJ 458;

(c) *Folin & Brothers Sdn Bhd (in liquidation) v Wong Boon Sun & Ors and another appeal* [2009] 5 MLJ 362; and

F (d) *Messrs Hisham, Sobri & Kadir v Kedah Utara Development Sdn Bhd & Anor* [1988] 2 MLJ 239.

[18] Now, firstly this procedural objection was only raised by the counsel for the defendant for the first time in his written submission which was filed to this court on 10 March 2017. This objection had been raised after more than seven months since the defendant first appeared in court defending the application for an order for committal to be issued against him. The issue of non-service of a copy of the statement and affidavit in support of the application for leave was never raised then. Instead the defendant requested for time to comply with the said order. The application for an order for committal thereafter had been adjourned several times upon the defendant request for adjournment. Despite non-service of the said document, the defendant then proceeded to defend himself and came out with the unaudited management account.

I [19] That's not all. Prior to raising the preliminary objection, on 1 March 2017, the defendant's solicitors had requested copies of the amended notice of application (ex parte) dated 14 March 2016, the amended statement pursuant to O 52 r 3(2) and the amended affidavit verifying the facts relied on duly affirmed by the plaintiff on 10 March 2016 ('the cause papers'). The plaintiff's solicitors have duly served all the cause papers to the defendant.

[20] Having requested and accepted the copies of the cause papers the defendant now had taken a different stand and approach and had contended that since he had not been served with a copy of the statement and affidavit in support of the application for leave, there was non-compliance of procedural law on the part of the plaintiff which was fatal to the plaintiff's application.

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[21] This court is utterly surprise with the conduct of the defendant. Having given the opportunity and time to comply the said order, the defendant had now has the delinquency and audacity to nitpick on a glaring non-issue in a grotesque attempt to supposedly justify the defendant's inexcusable conduct. This court takes grave notice of the defendant's ever changing stance and to an extent, deceptions against this court. The defendant's trail of incoherence and total lack of genuine pursuit starts with the defendant seeking time and time again for more time to comply with the said order (to furnish duly audited final accounts). So to this court, it is well within the understanding of the defendant that an audited account is required.

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[22] To this court, when the defendant had only raised the issue of non-service of the cause paper at the eleventh hour and had all along proceeded to defend himself by producing the unaudited management account and filing affidavits, the defendant had not been prejudiced at all of the non-service and there was no injustice caused to the defendant. In this instance, the cause papers were duly served on the defendant upon request by the defendant's solicitor. And, therefore, it is this court's judgment that the plaintiff had fulfilled the requirement of O 52 r 3(2) of the ROC 2012.

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[23] Be that as it may, O 52 r 4(4) gives this court the discretion to dispense with the service of the notice if it thinks just to do so. Also this court under O 1A of the ROC and O 2 r 2 has discretion to rectify and cure the non-compliance.

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[24] There are no merits whatsoever in the procedural objection raised by the defendant and thus, this court will now proceed to determine the plaintiff's application.

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THE LAW

[25] The law relating committal proceedings is well settled. It is trite law that committal proceeding is criminal in nature since it involves the liberty of the alleged contemnor.

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[26] In the case of *Tan Sri Dato' (Dr) Rozali Ismail & Ors v Lim Pang Cheong @ George Lim & Ors* [2012] 3 MLJ 458 (Tab 1), the Federal Court referred to the case of *Re B (JA) (An Infant)* [1965] Ch 1112 (Tab 2) in which Cross J in

A had this to say:

B Committal is a very serious matter. The courts must proceed very carefully before they make an order to commit to prison; and rules have been laid down to secure that the alleged contemnor knows clearly what is being alleged against him and has every opportunity to meet the allegations. For example, it is provided that there must be personal service of the motion on him even though he appears by solicitors, and that the notice of motion must set out the grounds on which he is said to be in contempt; further, he must be served as well as with the motion, with the affidavits which constitute the evidence in support of it.

C It is clear that if safeguards such as these have not been observed in any particular case, then the process is defective even though in the particular case no harm may have been done. For example, if the notice has not been personally served the fact that the respondent knows all about it, and indeed attends the hearing of the motion, makes no difference. In the same way, as is shown by *Taylor v Roe*, if the notice of motion does not give the grounds of the alleged contempt or the affidavits are not served at the same time as the notice of motion, that is a fatal defect, even though the defendant gets to know everything before the motion comes on, and indeed answers the affidavits.

E When, however, one passes away from safeguards which are laid down in the interests of the contemnor and comes to consider mere verbal deficiencies in the documents in question — cases where the documents do not comply strictly with the rules, but it is impossible that in any conceivable case the contemnor could be in any way prejudiced by the defects — then it seems to me that there is no reason why the courts should be any slower to waive such technical irregularities in a committal proceeding than they would be in any other proceeding. (Emphasis added.)

F The Federal Court then went on to state,

In similar tone, Lord Denning MR in *McIlraith v Grady* [1968] 1 QB 468 said at p 477:

G Here we must remember the fundamental principle that no man's liberty is to be taken away unless every requirement of the law has been strictly complied with.

Later, in *Re Bramblevale Ltd* [1970] 1 Ch 125, Lord Denning MR reaffirmed the same and had this to say:

H A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time honoured phrase, it must be proved beyond reasonable doubt (see Lord Denning MR in at p 137).

I [27] In *Messrs Hisham, Sobri & Kadir v Kedah Utara Development Sdn Bhd & Anor* [1988] 2 MLJ 239, it was held that:

Now, it is well-settled law that contempt of court is an offence of a criminal character since the liberty of the alleged contemnor is at stake. That being so, it is fundamental that a man ought not to be penalised unless he has both a fair opportunity to comply with the law and the capacity to do so. Any other approach

- would not only be morally objectionable but also should have no place in a legal system based on ideas of fair play and justice. A
- [28] In the present case it is undisputed that up until the committal proceedings was fixed for hearing on 16 October 2016, the defendant had not comply the said order. However, upon the defendant's application for time to comply the said order, this court had exercised its discretion to allow time and had given the defendant the opportunity to comply with the said order. B
- [29] Having two months' time to comply the said order, the defendant on 6 December 2016 had only submitted to this court a set of documents wherein on its cover is written or stated 'Management Account for the Year End 31st December, 2008': C
1. Balance Sheet D
 2. Profit & Loss
 3. General Ledger Detail.
- [30] This court will refer this set of documents as 'the management account'. E
- [31] The defendant was then directed by this court to serve the management account to the plaintiff by enclosing it in an affidavit.
- [32] Upon his perusal, the counsel for the plaintiff had taken up several issues regarding of the management account, namely: F
- (a) what was submitted by the defendant is a management account and not 'an audited final accounts';
 - (b) there were numerous cash withdrawals amounting to RM726,884.99 over a period of less than three years, the payments of commissions totaling RM121,299; and G
 - (c) writing off of the partnership debt owed by third parties amounting to RM177,636.85 without consulting the plaintiff. H
- [33] The plaintiff's counsel had requested the court's indulgence to engage another firm of accountants to carry out the audit the said partnership which this court had obliged. I
- [34] Thereafter, the plaintiff had engaged an accounting firm (NK Associates), however the accounting firm had replied to the plaintiff's counsel that they were unable to carry out the audit due to the following reasons:

- A** (a) unavailability of the ledgers relating to all the ‘income and expenses’ items from years 2005–2008; and
- (b) unavailability of documents/records relating to expenses for the years from 2006–2008;

B [35] Further, the said firm’s accountants also requested for the:

- (a) general ledgers and its supporting documents
- (b) management accounts with general ledgers, customer ledger, creditors ledger and bank reconciliation;
- C** (c) sales book/invoices;
- (d) payment/cash/salary vouchers — supplier payments, utilities payments, payroll expenses, EPF/SOCSO; and
- D** (e) copy of tenancy agreement.

E [36] By way of a letter dated 27 February 2017, the defendant’s solicitor informed that the plaintiff’s solicitor that the defendant was unable to accede to the request as he was not in possession of any of the documents.

[37] It was submitted by the plaintiff that the ‘management accounts’ prepared by the defendant did not comply the court’s order for the following reasons:

- F** (a) the management account was not an audited accounts as undertaken by the defendant through his solicitors. The management accounts were purportedly prepared by the defendant’s account personnel by the name of Ms Santhi a/p Sangaran. But looking at the *endorsement found at p 1*
- G** and this management account was signed by the defendant himself;
- (b) the management account failed to disclose an account of the debts and liabilities of the partnership from June 2005–31 May 2008;
- (c) the management account failed to disclose all the receivables and payments, all dealings and transactions of the defendant in respect of the partnership from June 2005 till 31 May 2008; and
- H** (d) the management account had failed to give an explanation as to what happened to all the movable assets of the partnership since 31 May 2008.

I THE DEFENDANT’S DEFENCES

[38] It was submitted on behalf of the defendant that the management accounts produced by the defendant has satisfied the terms of the order of the court dated 10 January 2011. The counsel for the defendant had also argued

that nowhere in the said order requires the defendant to produce an audited final account.

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[39] According to the counsel for the defendant, what was ordered to the defendant is for the defendant to produce an account of all Sinar Cahaya's debts, liabilities, payments, receivables, payments, dealings and transactions of monies, transactions from June 2005 up to 31 August 2008 and for the defendant to give an explanation as to what happened to all of the movable assets of the partnership since 31 May 2008. The terms of the said order allegedly did not state or mention that the account to produce by the defendant must be a final audited account. And thus, the defendant alleges that the plaintiff cannot contend that the said management account did not comply with the said order just because it was not an audited account.

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[40] It was further contended by the defendant that the management account was prepared by a 'juruakaun' from one firm by the name of Tetuan Shaistri & Co and not him. The alleged reason his signature appearing on page one was only to endorse that the receipt of the prepared account was on the basis that the original company source documents was given by him to the 'juruakaun'.

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DECISION OF THE COURT

[41] This court is mindful that the order dated 10 January 2011 did not explicitly state that the account to be produced by the defendant must be the final audited account. Nonetheless, this court must also be mindful also of the historical background and the entire narrative of the dispute between the plaintiff and the defendant. In the present case, it was the defendant who was the managing partner and was responsible for the upkeep of the said partnership's accounts.

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[42] The apparent fact here is that the order issued by the court is on the plaintiff's claim as a partner against his other partner, the defendant, who is entrusted and responsible to conduct and manage the partnership firm as well as the partnership's accounts. Now the defendant is alleged to have not properly managed the firm in which the plaintiff alleges to have received profits which are vastly less than what was received by the defendant. Considering the fact that the plaintiff has no information regarding the expenses and accounts management of the partnership firm (particularly because all of the accounting documents are in the possession of the defendant), the plaintiff initiated the originating summons. The court which had determined the originating summons has issued the order dated 10 January 2011.

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[43] Thus, with such allegation made against the defendant, the inevitable

A inference is that the order to produce the accounts against the defendant, must
have referred to and meant to be an account properly prepared by a certified
accountant who should be a neutral party who has no personal interest at all
with the partnership. Only through such neutral auditing and evaluation of
B records and accounts of the partnership's debts, liabilities, payments,
receivables, payments, dealings and transactions of monies, from June 2005 up
to 31 August 2008. Only with this neutral audited account that the defendant
may fairly give an explanation (if there is any to begin with), as to the what had
transpired regarding all of the partnership's movable assets since 31 August
C 2008.

[44] It is clear that the management account submitted by the defendant was
signed by the defendant. Even though the defendant had asserted that one
D Madam Santhi a/p Sangaran was tasked with the preparation of the
'management accounts', it is undisputed that his signature appears on p 1 of the
unaudited account. The defendant attempted to furnish yet another lame
excuse that he had signed it for purposes of endorsing that the receipt of the
prepared account was on the basis that the original company source documents
E was given by him to the 'juruakaun'. There was never any such qualification
present in the document. Even if indeed the management accounts were
prepared based on so-called original documents from the partnership, it does
not negate the factum that the accounts were not prepared by a proper certified
accountant and has yet to be audited. Nevertheless, such lame excuse was made
F baseless without any evidence. This court is more inclined to infer that it is
infinitely more probable than not that the management accounts were verified
only by the defendant himself, and is a self-serving document which offers no
value at all to this court.

G [45] This court agrees with counsel for the plaintiff that there was nothing
from the said firm (Tetuan Shaisti & Co) which mentions that the defendant
confirms in any acceptable way that Madam Santhi a/p Sangaran was
responsible in preparing the said 'management accounts' and that the said
H 'management accounts' have been prepared as per the terms of the order dated
10 January 2011. Furthermore, there was no verification or proof that this
Madam Santhi a/p Sangaran is a professional accountant attached or working
with Tetuan Shaisti & Co and that she actually had prepared the management
account.

I [46] This court also takes cognisance that in the defendant's affidavit, the
defendant had referred Madam Santhi a/p Sangaran as 'juruakaun' and at the
endorsement page at p 1, Madam Santhi a/p Sangaran was described as the
'juruakaun or account personnel'. A 'juruakaun or account personnel' is

definitely not an accountant. In Bahasa Malaysia an accountant is described as 'akauntan' and not a 'juruakaun'.

A

[47] In the present case, this court must also not ignore the fact that upon the defendant being served with the said order, there were a series of communication between both the solicitors for the plaintiff and the defendant. The defendant's solicitors by a letter dated 27 April 2012 had given the undertaking to forward to the plaintiff the 'duly audited final accounts'. The undertaking was clear on its term.

B

[48] With this undertaking, this court is of the view that the defendant and his solicitors knew and was well aware of the fact the said court order requires an audited final account and nothing less than an audited final account. The defendant cannot now contend that there is nothing in the said order that requires an audited account to be produced by the defendant.

C

D

[49] More so, in this present case, the defendant was compelled to appear before this court after being served with the cause papers for committal. The same solicitors who have been in conduct of the matter since the commencement of the originating summons filed in 2009 came on record as the defendant's solicitors for the present proceedings. No explanation has been furnished by the said solicitors or the defendant himself on the reason they had utterly failed to comply with the order of the court dated 10 January 2011.

E

[50] In the present case, it is this court's judgment that (even though the said order did not specifically mentioned the words 'audited account'), from the beginning since the order was granted, it was within the parties' mutual understanding that the defendant had taken upon himself to furnish the plaintiff with an audited account and that the audited account will be prepared by a firm of auditors and not by the defendant himself.

F

G

[51] In fact here, the defendant's solicitors had specifically informed the plaintiff's solicitors that the accounting firm of Shaistri & Co will be engaged by the defendant to undertake the task of preparing the audited accounts.

H

[52] Thus, this court is of the view that the defendant obviously knows what was required of him when the court ordered him to furnish the accounts as stipulated in the original order. Therefore, it is also this court's view that the defendant surely cannot now rely on mere semantics by justifying that a 'management accounts' fulfills the requirement of audited accounts as mutually understood by both parties, especially the defendant.

I

[53] Upon close perusal of the management account, this court also fully agrees with the counsel for the plaintiff that the management account

- A produced by the defendant does not comply and satisfy the order of the court dated 10 January 2011 namely because the unaudited accounts:
- (a) failed to disclose true and impartial accounts of the debts and liabilities of the partnership from June 2005–31 May 2008;
- B (b) failed to disclose true and impartial accounts of all the receivables and payments, all dealings and transactions of the defendant in respect of the partnership from June 2005 till 31 May 2008; and
- (c) failed to give a true and impartial explanation as to what happened to all the movable assets of the partnership since 31 May 2008.
- C

[54] Thus, this court finds the defendant guilty of contempt. And therefore, this court allows the application for an order of committal against the defendant, Encik Selva Kumar a/l Parmal.

D SENTENCE

[55] After considering the defendant's plea of mitigation, the defendant is hereby sentenced to three months imprisonment from today.

- E *Application for order of committal against defendant allowed; defendant sentenced to three months' imprisonment.*

Reported by Dzulqarnain Ab Fatar

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